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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

TWINBORO CORPORATION, *Petitioner,* *against* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	No.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Twinboro Corporation, respectfully prays that a writ of certiorari issue to review an order, judgment and decree of the United States Circuit Court of Appeals for the Second Circuit, entered on May 23, 1945 (R. 75), affirming an order and decision of The Tax Court of the United States entered on September 9, 1943 (R. 34). A certified transcript of the record is furnished herewith in accordance with Rule 38, Par. 1, of the Rules of this Court.

The opinion of the Tax Court (R. 7-32) is unreported. The opinion of the Circuit Court of Appeals (R. 72-4) is reported at 149 F. (2d) 574.

STATEMENT

The issue raised by this petition is the same as the first issue raised and discussed in the accompanying petition and brief of Winter Realty & Construction Co.

Prior to 1932, the City of New York took by condemnation proceedings certain property owned by the petitioner which had a tax basis of $29,745.68. Title to the property condemned passed to the City of New York on November 4, 1931 (R. 11, 12). During the years 1932, 1935 and 1936, the City paid to the petitioner the respective net amounts of $50,191.04, $10,806.60 and $79,285.62 aggregating $140,283.26, as compensation (exclusive of interest) for the property taken (R. 12). Gain upon such awards was accordingly realized as follows (R. 17):

1932	$20,445.36
1935	10,806.60
1936	79,285.62

As in the Winter Realty case, prior to the end of 1932, the petitioner made an application for permission to establish a replacement fund which was received but apparently lost (R. 14). After making several inquiries about the first application, the petitioner made a second application to establish a replacement fund in 1937 (R. 16). Neither of such applications was ever acted on by the Commissioner of Internal Revenue.

Upon receipt of payment in each of the years 1932, 1935 and 1936, the petitioner (just as in the Winter Realty case) had forthwith entered the full net amount in a "replacement fund" which appeared on the liability side of the ledger (R. 14, 15).

Furthermore, the petitioner forthwith invested $50,000 of the award in a real estate mortgage (R. 18).

The Statute

The applicable statute is § 112(f) of the Revenue Acts of 1932, 1934 and 1936 (47 Stat. 169, 48 Stat. 860, and 49 Stat. 1648, respectively). Such section and the Treasury Regulations promulgated pursuant thereto are set forth in the Appendix to the accompanying petition filed by Winter Realty & Construction Co.

The Commissioner's Determination

The Commissioner determined that no part of the awards were expended forthwith in the acquisition of other property similar or related in service or use to the property condemned or in the establishment of a replacement fund (R. 16). He accordingly determined that the entire amount of the capital gain realized for each of the years 1932, 1935 and 1936 was taxable to the petitioner.

The Decision of the Tax Court

The Tax Court decided the case as if the petitioner had obtained "permission to establish a replacement fund" under the Treasury Regulations (R. 25). (The statute does not require such permission). The Tax Court held, however, (against the petitioner) that no replacement fund was established, mainly upon the ground that a large part of the award money was invested in real estate mortgages, which would probably not be regarded as an ideal investment for the purpose of a replacement fund (R. 28). The

petitioner appealed from that portion of the Tax Court's decision.

The Tax Court also found that the petitioner forthwith expended $20,000 of the award received in 1932 "in the acquisition of other property similar or related in service or use to the property so converted." No appeal was pressed from that portion of the Tax Court's decision.

The Decision of the Circuit Court of Appeals

As in the Winter Realty case, on the first issue, the Circuit Court of Appeals inferentially disapproved the main ground of the Tax Court's decision, namely, that real estate mortgages were not a proper investment for a replacement fund. The Circuit Court of Appeals held, however, that the replacement fund set up by the petitioner was not within the statute and the Treasury Regulations *solely* because the Commissioner of Internal Revenue had not given permission to establish the fund.

JURISDICTION

Jurisdiction of this Court is invoked under § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938, 28 USC § 348(a)). The date of the order, judgment and decree of the Circuit Court of Appeals for the Second Circuit to be reviewed is May 23, 1945 (R. 75).

QUESTION PRESENTED

An administrative question of importance is presented (being the same as the first question presented in the ac-

companying petition and brief of Winter Realty & Construction Co.):

Where a statute provides that gain shall not be recognized where property is involuntarily converted into money which is "forthwith in good faith, under regulations prescribed by the Commissioner with the approval of the Secretary, * * * expended in the establishment of a replacement fund", and Treasury Regulations promulgated under such statutory provision provide that the taxpayer "may obtain permission to establish a replacement fund in his accounts" and in such a case "should make application to the Commissioner", may the Commissioner, by ignoring applications filed pursuant to the Regulations, prevent the taxpayer from establishing a replacement fund where such fund is otherwise properly established?

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

The Circuit Court of Appeals has decided an important question of Federal administrative law which has not been, but should be, settled by this Court, namely, whether a Federal administrative officer (who by his own regulation prescribes that a taxpayer should ask permission before the taxpayer may have a privilege given to him by the statute) may, by simply ignoring applications for such permission and not acting thereon, deprive the taxpayer of the privileges which the statute prescribes.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, sitting at New

York, New York, commanding said Court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court; that the order, judgment and decree of the Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

TWINBORO CORPORATION,
Petitioner,

By
ROSWELL MAGILL

GEORGE G. TYLER
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August 15, 1945.